IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KAREN LOUISE SMITH, Appellant.	No. 38740-9-II UNPUBLISHED OPINION

Penoyar, J. — Karen Louse Smith appeals her unlawful possession of methamphetamine conviction, arguing that the search incident to her arrest was unlawful under *Arizona v. Gant*[1] and, thus, the trial court erred in not suppressing the evidence. The State concedes the search was unlawful under current law but argues that the good faith exception applies to prevent suppression of the evidence. We reverse and remand with instructions to dismiss the conviction.

FACTS

Because this was a stipulated facts trial and Smith's challenge is to the failure to suppress evidence, we set out the following facts from testimony presented at the CrR 3.5/3.6 hearing.

On September 5, 2008, City of Poulsbo Police Officer John Halsted was driving on Old Belfair Highway when a vehicle passed in the other direction. Halsted checked the license plate number and discovered that the car was registered to Karen Louise Smith and that her license to drive was suspended. Halsted turned his vehicle around, pursued Smith, activated his lights, and performed a traffic stop.

Once he verified that Smith was driving, he arrested her, handcuffed her, placed her in the

[1] ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

rear of his police vehicle, and closed and locked the door. He then searched her vehicle and discovered methamphetamine in a camera case inside a duffel bag in the back seat. He explained at the suppression hearing, "I searched her vehicle as just a standard protocol that I always do. It is a search incident to arrest of the car." Report of Proceedings (RP) at 9. When asked if he searched the car because of anything Smith said, Halsted testified, "I searched it as part of my protocol as a search incident to arrest. That's just what I do." RP at 10.

Smith remained in his patrol car the entire 15 minutes it took him and another officer to search her car. When Halsted showed Smith the methamphetamine, she admitted that it was hers, that she had been in drug court in 2007, but that she was suffering from breast cancer and had gone back to using methamphetamine. She explained that she smokes and snorts it but that she was sick of the lifestyle.

Defense counsel asked Halsted if there was anything that made him suspicious or fearful of Smith. He responded that it was a standard stop, that he followed standard protocol, and that danger had nothing to do with his reason for arresting Smith. He reiterated that he had no suspicions about her and that he did not smell anything that alerted him to the presence of drugs. Finally, he testified that she could not get out of his police vehicle because the back doors were locked from the outside.

Defense counsel argued that Washington case law had expanded *Stroud*[2] beyond its intended scope, that a search incident to arrest needs to be limited to the crime of arrest, and that there is no generalized license to search following every lawful arrest. Counsel cited *Arizona v.*

[2] *State v. Stroud*, 106 Wn.2d 144, 720 P.2d 436 (1986) *overruled by State v. Valdez*, 167 Wn.2d 761, 778, 224 P.3d 751 (2009).

Gant,[3] which had been argued before the U.S. Supreme Court, though that court had not yet issued an opinion. After the trial court denied the motion to suppress based on *Stroud*, counsel explained that he was preserving the issue for appeal in case the Supreme Court's decision would favor Smith.

Smith then agreed to a stipulated facts trial at which the trial court found her guilty. It later imposed a 30-day standard-range sentence.

ANALYSIS

The State concedes that *Arizona v. Gant* applies to Smith and that the search incident to arrest violated the Fourth Amendment.[4] It does not claim inevitable discovery or make a corpus delicti argument. The State argues, however, that the evidence need not be suppressed despite the illegality of the search because Officer Halsted acted in good faith reliance on federal and state law decisions regarding searches incident to arrest. It relies primarily on *Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979).

This court rejected the same argument in *State v. McCormick,* 152 Wn. App. 536, 544, 216 P.3d 475 (2009), and more recently in *State v. Harris*, 154 Wn. App. 87, 99, 224 P.3d 830 (2010), reasoning that to apply it would undermine retroactivity analysis. *Harris* discussed *United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009); and *United States v. Buford*, 623 F.Supp.2d 923 (M.D. Tenn. 2009), where the courts held that applying the good faith exception

[3] ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).
[4] *See also State v. Valdez*, 167 Wn.2d 761, 778, 224 P.3d 751 (2009) (a warrantless search of an automobile is permissible under this exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest); *State v. Patton*, 167 Wn.2d 379, 219 P.3d 651 (2009) (search incident to arrest justified only when there is a nexus between the arrestee, the vehicle, and the crime of arrest).

would conflict with retroactivity precedents. *See Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (failure to apply newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication).[5]

We reverse and remand with instructions to dismiss the conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, C.J.

Armstrong, J.

[5] The State also argues that the good faith exception also applies under article 1, section 7 of the Washington State Constitution, relying on *State v. Potter,* 156 Wn.2d 835, 132 P.3d 1089 (2006).We need not address this argument in view of our holding under the Fourth Amendment. We do note, however, that this court rejected similar arguments in *McCormick* and *Harris.*